

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GUSTAVO S.

Claimant,

v.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2011040537

DECISION

Administrative Law Judge (ALJ) Sophie C. Agopian, Office of Administrative Hearings, heard this matter on May 19, 2011, in Alhambra, California. Claimant Gustavo S. was represented by his mother, who was assisted by Pamela Carreon, a certified court interpreter. The Eastern Los Angeles Regional Center (Service Agency) was represented by Residential Services Supervisor Margarita Duran.

On the day of the hearing, testimonial and documentary evidence was received, the record was closed, and the matter was submitted for decision. However, following the matter's submission and pursuant to the parties' agreement, the record was reopened to receive additional evidence from Service Agency that was determined by the ALJ to be necessary to resolve the sole issue in the case. Such evidence was received on July 12, 2011, marked for identification as Service Agency's Exhibit 15, and admitted into evidence. The record was therefore closed on July 12, 2011, and the matter was resubmitted for final decision on the same day.

ISSUE

Whether Service Agency will fund a music therapy assessment for claimant from Pasadena Child Development Associates.

FACTUAL FINDINGS

1. Claimant is a six-year-old Service Agency consumer who has been diagnosed with autism and a seizure disorder. He has received regional center services since prior to age three under the Service Agency's early intervention program. He lives with his mother.

2. During the 2010-2011 school year, claimant attended a school-readiness program at Perez Special Education Center five days each week, where he received 30 minutes each week of small group speech and language services and 30 minutes each week of individualized occupational therapy. Prior to the end of the school year, claimant's speech services had been reduced to a 30-minute-per-week consultation only and his occupational therapy had been increased to 1.5 hours per week. The reasons for these changes were not established by the evidence.

3. During claimant's February 9, 2011, Individualized Program Plan (IPP) meeting with Service Agency, claimant's mother expressed concern that claimant's school program was inappropriate for him. In addition to her concerns about his inadequate speech services, claimant's mother contended that claimant was experiencing maladaptive behaviors at school, including running away, lack of focus and not following directions. He also required hand-over-hand assistance to perform academic tasks; thus, claimant's mother believed that claimant required a one-to-one aide to support him at school. To address these needs, Service Agency agreed to provide claimant with advocacy support during his individual education program (IEP) team meetings. Claimant's mother testified that as of the date of the hearing, she is supplementing claimant's speech services by paying for additional speech therapy two times each week.

4. During the February 2011 IPP, claimant's mother also expressed concerns about claimant's maladaptive behaviors at home and in the community, such as "wandering/running away, tantrum, resistiveness, frustration and aggression." The aggression she described is primarily physical and directed at others, such as hitting, kicking and throwing things. Because claimant lacks understanding of safety rules, he has run out into the street toward oncoming traffic. Claimant, therefore, requires constant supervision to ensure his and others' safety. To address claimant's need for constant supervision and to assist claimant's mother with caring for claimant, Service Agency agreed to provide claimant with 30 hours per month of respite services. It was also noted in his IPP that claimant was receiving funding from the county for 188 hours per month of in-home supportive services (IHSS) for claimant's protection and supervision.

5. Claimant's mother believes that claimant's maladaptive behaviors are a function of his communication deficits, as claimant is only able to communicate his needs by using one-word expressions, gestures or sounds. When claimant is frustrated he screams or cries loudly. Claimant's mother believes that increasing claimant's language and vocabulary skills will help reduce his maladaptive behaviors. Because claimant is receiving only minimal speech and language support from his school district, claimant's mother would like claimant to receive music therapy services to help with claimant's language and vocabulary skills. According to claimant's mother, claimant enjoys and is motivated by music. It also

helps him to concentrate, relax and focus. She believes that through music, claimant will be able to learn to connect words and sentences and will be able to increase his communication. Claimant's mother, therefore, requested that music therapy services be provided to claimant.

6. On February 28, 2011, Service Agency provided claimant's mother with written notice that it was denying her request for music therapy services on the basis of Service Agency's suspended authority to purchase "non-medical therapies such as specialized recreation, art, dance and music." Service Agency further stated that claimant was already receiving similar services through speech therapy from school and funding for a social skills program at Pasadena Child Development Associates (PCDA), which incorporates music therapy into its weekly sessions. Claimant's mother timely appealed Service Agency's denial of her request, and requested "at minimum" an evaluation to determine if claimant would benefit from a music therapy program. During the hearing, claimant's mother clarified that by her appeal she is seeking only a music therapy assessment. She prefers to have the assessment completed before deciding whether to request the services.

7. From 2010 through 2011, claimant attended a weekly socialization program at PCDA. The program consisted of "individual social skills, pairing [and] intervention sessions" with his parent for one hour. Claimant was also "matched with another social skills individual client with a second facilitator to provide one on one support in bridging peer interactions." The purpose of the program was to assist claimant in developing skills necessary for participation in a peer group, which included "initiating play with a play partner/peer, having pleasurable interactions with play partner/peers and increas[ing] safety awareness both in clinic, home and out in the community."

8. After the first six months of the program until around March 2010, claimant's mother reported being "very happy" with his progress, stating that claimant "is doing much better now that he is with a peer every week." Claimant was "able to notice others more and his eye-contact... has improved."

9. As of April 2011, claimant was showing regular improvement in developing his social skills. For example, his mother noted that his language had increased. According to the April 2011 progress report, claimant was still having difficulty expressing his wants and needs among peers. However, claimant was able to repeat phrases made by the facilitator in demonstrating how to use language to communicate. With much prompting and modeling by the facilitator, claimant was able to say, "bus back please" or "my turn with bus" in order to retrieve a toy bus which had been taken from him by a peer. As a result, a new goal was developed for claimant to ask his mother for help, with his mother's prompting and modeling, when feeling distressed.

10. According to one of the PCDA progress reports, it was noted that facilitators receive weekly training in various areas, including speech and music therapy. According to PCDA's marketing brochure, music therapy is "the planned use of musical influences on human brain functioning." It engages "children in singing, listening, moving, playing instruments, and creative activities creating a familiar musical environment that encourages

positive interpersonal interaction and allows clients freedom to explore and express.” Based on this definition of music therapy services, Service Agency did not establish that music therapy was used during any of the weekly social skills training sessions provided to claimant. It was noted only that musical instruments were available to, and used by, the children during play sessions.

11. PCDA’s marketing brochure for music therapy corroborates claimant’s mother’s contention that music therapy may be useful to claimant in developing his language skills. However, it also notes that music therapy may enhance other skills, such as social interaction, turn-taking, attention and motor skills. Thus, music therapy is a service to enhance development in various skill areas, not just speech.

12. According to claimant’s February 2011 IPP, claimant is receiving other services which may facilitate his language development. Claimant is receiving 7.5 hours each month of social-emotional developmental intervention (SEDI) services from PCDA. These services are provided primarily at home or in the community, such as a park or areas in the neighborhood, and work on claimant’s safety awareness skills. One of the goals worked on includes having claimant respond appropriately to verbal and visual commands for “stop,” especially during dangerous situations when claimant runs away from his caregiver. In addition, during the time of the IPP, claimant was also receiving discrete trial training (DTT) for 16 hours each week to address his behavioral challenges, mainly his elopement, tantrums and self-injurious behaviors. According to his most recent progress report for DTT, claimant is learning functional communication, including speaking, signing, and using pictures or gestures, to replace problem behaviors. Claimant, specifically, is learning to express his needs and desires with “I want” phrases in place of attention-seeking behaviors. He is also learning to sing songs, such as Twinkle Twinkle Little Star, with hand movements to increase his expressive communication.

13. Claimant’s mother testified that none of the services funded by Service Agency are sufficiently addressing claimant’s communication deficits. She contends that the SEDI program and DTT address his safety needs and nothing more, and that the socialization skills program is not as effective as music therapy in increasing his communication skills. Claimant’s mother requests that claimant at least receive an evaluation to determine if music therapy would be effective for him in increasing his verbal communication.

14. Claimant’s mother contends that Service Agency’s denial of the assessment is in violation of a settlement agreement resulting from a class action lawsuit brought against Service Agency, to which claimant was a party as a class member. The settlement agreement prohibits Service Agency from “[t]erminating or denying funding for DIR treatment programs, or failing to make DIR treatment programs available to any and all class members” and from “[c]lassifying, characterizing, identifying or labeling DIR treatment programs as ‘experimental, non-medical therapy, specialized recreation, or social

recreational,’ as those terms are used in the Trailer Bill.” According to the agreement, DIR treatment programs are defined as the following:

any program that is based, in whole or in part, upon the Developmental, Individual Difference, Relationship-based Model of treating autism. This includes, but is in no way limited to programs that utilize Floortime methods of treatment. Furthermore, programs that are formally referred to as either DIR/Floortime or simply Floortime are included within the scope of this definition... Examples of current DIR treatment programs that are intended to be covered by this Settlement Agreement include, but are in no way limited to, Teen Club provided by Pasadena Child Development Associates (PCDA), Social-Emotional Developmental Intervention (SEDI) provided by PCDA, Socialization Skills Training Program provided by PCDA, Developmental-Behavioral Consultation provided by PCDA, Floortime Development Play Therapy provided by Holding Hands Pediatric Therapy & Diagnostics, Inc., Social Skills Group Therapy provided by Holding Hands Pediatric Therapy & Diagnostics, Inc., Social Skills Playgroup for Children provided by Dr. Andrea Davis, Adaptive Skills Training provided by Dr. Andrea Davis, clinical psychology services provided by Dr. Mona Delahooke, and the Adaptive Skills Training provided by Dr. Mona Delahooke.

15. Service Agency disputes that its refusal to fund a music therapy assessment is in violation of the settlement agreement. It contends that regardless of whether music therapy is included within the definition of a “DIR treatment program,” claimant is already receiving several hours each month of a DIR treatment program, as specifically defined in the settlement agreement. Service Agency’s contention is persuasive because the settlement agreement specifically refers to PCDA’s socialization skills program and the SEDI program that claimant is currently receiving as services that cannot be denied pursuant to the Trailer Bill. As such, even if music therapy was a service immune from termination by the settlement agreement, Service Agency established that claimant is already receiving the benefit of a DIR treatment program by way of the socialization skills and SEDI programs, and is not entitled to a duplicative service. On the other hand, claimant’s request is not for a duplicative service, but is only for an assessment to see if claimant would respond better and perhaps progress faster in his language development with a music-based DIR treatment program. Claimant’s request for a music therapy assessment by PCDA is a reasonable request that should be granted for the reasons below.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) The purpose of the Lanterman Act is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509 and 4685), and to enable them to approximate the pattern of everyday living of non-disabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501 and 4750-4751.) Accordingly, persons with developmental disabilities have certain statutory rights, including the right to treatment and habilitation services and the right to services and supports based upon individual needs and preferences. (§§ 4502, 4512, 4620 and 4646-

4648). Consumers also have the right to a “fair hearing” to determine the rights and obligations of the parties in the event of a dispute. (§§ 4700-4716.)

2. The determination of which services and supports are necessary for a consumer is made through the IPP process. The IPP must be developed through a process of individual needs determination, which may include the consumer, the consumer’s parents, a legal guardian or conservator, or authorized representative. The consumer and the family must have the opportunity to actively participate in the development of the plan. (§ 4646, subd. (b).) The IPP must include a statement of the consumer’s goals and objectives based on the consumer’s needs and preferences or, when appropriate, the needs and preferences of the consumer’s family. (§ 4646, subd. (a).) The development of the IPP must include consideration of a range of service options proposed by the IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

3. Section 4648 describes the activities for which regional centers are responsible in order to achieve the stated objectives of a consumer’s IPP, including securing needed services and supports. Services and supports may include “diagnosis, evaluation, treatment... physical, occupational and speech therapy... recreation... behavior training and behavior modification programs... [and] social skills training.” (§ 4512, subd. (b).)

4. The standard of proof in this case is the preponderance of the evidence because no other law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, §115.)

5. A party asserting a new claim or proposing changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; Evid. Code, § 500 [“a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”]) In this case, claimant has the burden of proof because he is requesting an assessment for music therapy, which has been denied by Service Agency.

6. Service Agency’s denial of the assessment is based upon its suspended authority to purchase “nonmedical therapies, including... specialized recreation, art, dance, and music” under section 4648.5, and its contention that claimant is already receiving services to improve his expressive language skills through speech therapy from school and through PCDA’s socialization skills program and the SEDI program. Section 4648.5 states, in relevant part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers’ authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

- (1) Camping services and associated travel expenses.
- (2) Social recreation activities, except for those activities vendored as community-based day programs.
- (3) Educational services for children three to 17, inclusive, years of age.
- (4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

¶ ... ¶

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

7. In other words, Service Agency contends that it is not responsible for assessing claimant for music therapy because it would not be able to fund music therapy for claimant if claimant were found to be eligible for music therapy services. Its contention is unpersuasive because it did not consider the "exemption" that is available to consumers when there are "extraordinary circumstances." Without an assessment for the service, it cannot be determined whether such "extraordinary circumstances" exist. Thus, at minimum, an assessment is required.

8. Furthermore, under the Lanterman Act, the preferences of consumers and their parents must be considered in developing a consumer's program. In this case, claimant's mother prefers music therapy as a form of treatment for claimant's communication deficits to other treatment forms he is receiving, such as the socialization skills program and the SEDI program. An assessment should therefore be conducted to determine whether claimant's mother's preference is supported by claimant's potential progress in such program. Additionally, an assessment may determine whether music therapy, as provided by PCDA, utilizes the DIR model. If it does, then Service Agency would be precluded from relying on section 4648.5 to deny funding for such program by reason of the settlement agreement. On the other hand, if music therapy is determined to be a DIR treatment program, then Service Agency's contention that it duplicates other services provided would be meritorious and claimant may be required to choose among the multiple programs based upon his progress. In any such case, a music therapy assessment is justified and required.

ORDER

Claimant Gustavo S.'s appeal is granted. Service Agency is required to fund a music therapy assessment at PCDA within 30 days of the effective date of this decision.

DATED: October 28, 2011

SOPHIE C. AGOPIAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days.